

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation  
of the

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING

v.

LACTALIS USA, INC., a New York  
Corporation,

Respondent.

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JULIO MARIO VELEZ,

Complainant.

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Case No.

E-200001-C-0223-00-e  
C 01-02-052  
02-15-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as precedential, pursuant to Government Code sections 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a). Commissioner Catherine F. Hallinan did not participate in the deliberation or decision in this case.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code sections 11523 and 12987.1, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: October 1, 2002

GEORGE WOOLVERTON

HERSCHEL ROSENTHAL

LISA DUARTE

HELEN R. MARS

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PROPOSED DECISION

Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on March 19 through 22, and April 9 through 10, 2002. Darcy J. Griffin, Staff Counsel, represented the Department of Fair Employment and Housing. James R. McDade, Esq., represented respondent Lactalis USA, Inc. Complainant Julio Mario Velez and respondent representative Lenny Bass were present at hearing. Certified Court Interpreters Rosela Castillo and Terry Allen provided, respectively, Spanish/English and Portuguese/English translation. Commissioner Catherine F. Hallinan was present the first day of hearing.

The record was held open for filing of post-hearing briefs, which the Commission received on June 13, 2002, and the matter was submitted on that date.

After consideration of the entire record, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On September 19, 2000, Julio Mario Velez (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) against

Lactalis USA, Inc. The complaint alleged that beginning in 1998 and continuing through July 31, 2000, Lactalis USA, Inc. violated the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, §12900 et seq.) The complaint alleged that complainant's coworkers and supervisor harassed and discriminated against complainant on the basis of his sexual orientation and national origin (Colombian). The complaint also alleged that Lactalis USA, Inc. failed to take action to prevent the harassment from occurring, as required by the Act.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On September 19, 2001, Dennis Hayashi, in his official capacity as Director of the Department, issued an accusation against Lactalis USA, Inc. (respondent). The accusation alleged that respondent discriminated against complainant by subjecting him to harassment based on his sex (male) and sexual orientation (homosexual) in violation of Government Code section 12940, subdivisions (a) and (j)(1). The accusation further alleged that respondent failed to take all reasonable steps to prevent harassment and discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

3. At all times relevant to the charges in the accusation, respondent produced specialty cheeses. Among its production facilities, it operated a plant in Turlock, California (Turlock plant or plant) where it employed approximately 80 employees. At the Turlock plant, employees spoke English, Spanish or Portuguese. Respondent was an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (j)(1), and (k).

4. Complainant was born in Colombia. He speaks Spanish and limited English. He identifies himself as homosexual.

5. At all relevant times, complainant lived with his parents in Turlock, California. His sister Lenore Gaufo lived approximately four blocks away, and visited her parents' home three to four times per week.

6. In August 1998, complainant began working for respondent as a temporary employee. On September 1, 1998, respondent hired complainant as a permanent production worker at the Turlock plant.

7. At all relevant times, Lenny Bass was Plant Manager for respondent's Turlock plant and in that capacity was responsible for the entire plant. In addition to Bass, upper management in the plant included Assistant Plant Manager Jean-Paul Martin and Production Manager Bertrand Rouille. Production Supervisors reported to the Production Manager, who in turn reported to the Assistant Plant Manager.

8. The plant had different crews working staggered shifts, each with a different supervisor. Production Supervisor Frank Neves supervised the early crew, which normally began at 3:00 a.m. and ended between 11:30 a.m. and 12:00 p.m. Leo Peralta supervised a later crew, starting at either 4:00 a.m. or 6:00 a.m., depending upon the type of cheese being produced. Production Supervisor Luis Lopez supervised a crew that began work at 7:00 a.m.

9. Throughout complainant's employment with respondent, complainant worked on the early crew. Production Supervisor Frank Neves was complainant's immediate supervisor.

10. Frank Neves began working for respondent in 1987 and became a supervisor approximately two years later. As a supervisor, Neves was responsible for assigning work to his crew and ensuring that they accomplished it. Neves determined when his employees took lunch and other breaks, as well as when they should report to work and when their shift ended. He was responsible for disciplining his crew, with authority to issue both oral and written reprimands. As part of his duties, Neves recommended employees for promotion. Neves also was responsible for taking and responding to his employees' complaints.

11. Complainant's job duties included stacking and washing molds. Along with many coworkers, complainant also engaged in "flipping" cheese, a process of turning cheese on racks. About once a week, complainant turned semi-soft cheese with Luis Lopez's crew. In addition, complainant performed cleaning duties in the plant.

12. Throughout complainant's employment, complainant was a good worker and had no work performance problems.

13. Throughout complainant's employment, a number of respondent's male employees subjected complainant to insults, name-calling and vulgarities. The conduct was not stray or isolated, but rather occurred frequently and continuously, and included:

a. In complainant's presence, coworkers frequently mimicked anal sex, twisted each other's nipples, and grabbed and slapped each other's buttocks. When doing so, some coworkers asked complainant if he "liked it." Some also grabbed their own genitals and offered them to complainant, asking him if he "wanted it."

b. Coworkers repeatedly called complainant "faggot," "joto" (Spanish slang meaning "queer" or "faggot"), "woman," "mamasita," "mariposita" (Spanish slang for homosexual or "queer," literally meaning "little butterfly"), "lesbian," and "my love." Coworkers also ridiculed complainant by calling him the names of female characters in Mexican television soap operas, including Thalia, Ana, and Rosalinda.

c. Coworkers mocked complainant by pointing at him, fluttering their fingers, puckering their lips, and walking in an exaggerated feminine manner.

d. On three occasions, coworker Arcadio Godinez exposed his penis to complainant. When doing so, Godinez said "suck my dick," told complainant he could have "everything you want" for \$2000, and asked complainant to suck his penis "in confidence." Godinez also asked complainant numerous sexual questions, including whether he liked men or women, "liked dick," "liked it from behind," and if he would like to have sex with him. Godinez told complainant that complainant had a "very good butt, a very good ass." Godinez mocked complainant on numerous occasions by asking him when they were going out or if he would have a drink with him, and if he had been "intimate" with coworker Terry

Sump. Godinez also called Sump and coworker Jeremiah Beshears complainant's "girlfriends."

e. On a regular, ongoing basis, coworker Jose Nunes grabbed his crotch, told complainant "it's big," and asked complainant if he liked or wanted to grab it. Nunes also told complainant that he had a "good ass."

f. Coworker Balleriano "Riano" Oseguera told complainant to stir the cheese with his "balls." Coworker Victor Vasquez grabbed Terry Sump's buttocks, telling complainant if he "wanted some" of Sump, he would have to pay Vasquez. Complainant responded by saying, "No, Terry is my friend."

g. Victor Vasquez also frequently tried to twist complainant's nipples. One time when Vasquez succeeded and complainant protested, Vasquez replied, "Do not speak to me, you faggot asshole."

h. Coworker Juan Carlos Carrillo told coworker David Rhoades that complainant was homosexual and that Rhoades should not associate with complainant. Both Carrillo and Rhoades called complainant "joto."

i. Supervisors Luis Lopez and Frank Neves also engaged in some of the offensive conduct directed toward complainant. On a number of occasions in complainant's presence, Lopez grabbed the buttocks of coworkers Arcadio Godinez, Jose Lacerda or Jose Nunes. Lopez also engaged in name-calling. On one occasion, supervisor Frank Neves tried to grab complainant's buttocks. Complainant asked Neves not to do this, saying it was not acceptable for a supervisor to engage in such conduct. Another time, Neves referred to complainant as "my love" when complainant asked to take a lunch break.

14. Complainant was offended by the conduct described in Finding of Fact 13. He felt targeted—someone his coworkers made fun of and mocked. Complainant experienced embarrassment, frustration, and nervousness because of the conduct. He also felt angry, anxious, and depressed.

15. Throughout complainant's employment, complainant made clear to the perpetrators of the conduct described in Finding of Fact 13 that their insults, name-calling and vulgarities were unwelcome and upset him. Complainant repeatedly told them not to engage in the conduct, saying that it was offensive and asking for them to respect him. Nonetheless, the conduct continued. When coworkers saw complainant becoming upset with the conduct, they often laughed at his distress.

16. Beginning in September or October 1998, and on many occasions throughout his employment, complainant complained to supervisor Frank Neves about his coworkers' conduct. He complained that coworkers grabbed their genitals and buttocks, twisted nipples, called him names, and fluttered their hands. Complainant also complained to Neves specifically about Arcadio Godinez' exposing his penis and Jose Nunes' crotch-grabbing. Neves responded in several different ways to the complaints, sometimes having no reaction

or laughing, and other times telling complainant that he would “take care” of it. Although Neves told the offenders to stop on some occasions, the conduct continued. Neves did not tell Lenny Bass or anyone in upper management at the plant about the complaints.

17. In May 2000, respondent distributed two documents to employees with their paychecks. The documents, entitled “Statement Against Harassment” and “Equal Employment Opportunity Policy Statement,” were in English.

18. Around mid-May 2000, Frank Neves called a meeting with some employees. At the meeting, Neves told the workers that any name-calling should stop. Arcadio Godinez and Jose Larcerra claimed their name-calling was in response to complainant calling them names. Complainant was not present and did not learn about the meeting until the hearing in this matter. After this meeting, coworkers continued to call complainant names.

19. In June 2000, plant manager Lenny Bass convened an employees’ meeting, without any other supervisors present, to discuss plant safety, equipment, and manufacturing practices. When Bass asked for questions, complainant told Bass he wanted coworkers to stop calling him names, that this offended him, and asked to be left alone. Coworker Balleriano “Riano” Oseguera interrupted complainant and accused him of name-calling. Bass halted the interchange and said that if harassment was occurring, it should stop immediately. During this meeting, Terry Sump said that everything complainant was complaining about was his “own fault,” because complainant was “openly homosexual.” To Sump, “openly homosexual” meant, in part, the way complainant gestured and his manner of speaking.

20. Several hours after the meeting, Frank Neves talked to complainant, telling him that he should have come to Neves first with any complaints, and not to Lenny Bass. This discussion made complainant feel as though Neves was “shutting my mouth” and depressed him. Complainant felt that his rights as an employee had been “cut off.”

21. After the June 2000 meeting, Lenny Bass spoke with Frank Neves about complainant’s complaint, asking if there was “anything to it.” Neves told Bass that he would speak with his crew. Thereafter, Neves told Terry Sump that he did not want anyone to play around anymore—no more slapping each other and no more name-calling. Neves had similar discussions with the other employees at the Turlock plant. After these discussions, however, name-calling and slapping continued.

22. Around July 20, 2000, while working in the semi-soft cheese room with complainant, Victor Vasquez grabbed his own genitals. Vasquez asked complainant if he “wanted it,” saying he would not charge complainant for it. Vasquez also said his penis was large, asking complainant if he wanted him to pull it out and show him. Complainant became “red with anger.”

23. On July 31, 2000, complainant did not report for work. Instead, later that morning complainant and his father, Marco Velez, met with Lenny Bass at the plant. Upset and

crying at the meeting, complainant told Bass about the demeaning and offensive conduct of his coworkers. Complainant also told Bass that he was experiencing pain in his hip from a previous industrial accident at the plant. Complainant told Bass that he could no longer work for respondent, that he could not “take it any more.” Bass suggested that Frank Neves be brought into the meeting, but complainant said no, becoming agitated when Bass mentioned Neves’ name. Bass had trouble understanding complainant because he was speaking in “broken sentences.” Upset, complainant left the meeting, feeling that Bass was not supportive of him.

24. Thereafter, on July 31, 2000, complainant began a medical leave based upon the pain in his hip from the previous industrial injury. Complainant did not return to work for respondent.

25. The first week of August 2000, Lenny Bass had to attend meetings away from the Turlock plant. Bass asked respondent’s controller Jared Bjarnason to talk with complainant and after doing so, to conduct an investigation about complainant’s concerns. As part of the investigation, Bjarnason interviewed employees, including complainant, and drafted prepared statements for each interviewee’s signature.

26. Jared Bjarnason interviewed complainant on August 7, 2000, and August 11, 2000. On August 9, 2000, Jared Bjarnason interviewed a number of respondent’s employees and later met with some of them again for follow-up. Terry Sump, aware that others were being interviewed, asked his supervisor, Leo Peralta, why he was not questioned. Peralta responded, “Your turn will come.” Respondent, however, never questioned nor interviewed Sump. Respondent also did not question or interview other employees who worked with complainant, including supervisor Luis Lopez.

27. On September 15, 2000, while complainant was on leave, respondent sent complainant the results of its investigation into his complaints. Respondent concluded that complainant and his coworkers called each other female names and coworker David Rhoades had told another worker, Juan Carlos Carrillo that if Carrillo continued to receive car rides from complainant, then people would think he was homosexual.

28. As a result of the investigation, respondent did not discipline any employees for name-calling. Respondent, however, gave David Rhoades a verbal warning to refrain from making derogatory comments to employees based on their sexual orientation.

29. After completion of the investigation, respondent showed a video tape on sexual harassment to its employees. In September or October 2000, respondent held a meeting with its employees where they discussed sexual harassment and harassment in general.

30. Respondent’s personnel handbook, which is in English, contains a written policy on sexual harassment. Respondent posted anti-harassment posters in its lunchroom.

31. In addition to the emotional distress set forth in previous findings of fact, the unwelcome conduct caused complainant emotional distress, as follows:

a. Prior to employment with respondent, complainant was happy and social. He was an outgoing person who openly shared experiences and talked with people. Within a month of beginning work for respondent, complainant's behavior changed. When he talked to his family about being made fun of and the name-calling at work, complainant was hurt and uncomfortable, sometimes saying that he did not feel like talking to anyone because the topic was homosexuality. After his first month of employment, complainant did not feel good about going to work. Complainant felt uncomfortable, nervous, and inferior. He also was sad, feeling depressed.

b. Complainant's emotional well-being gradually declined during his employment with respondent, with complainant becoming visibly upset and crying when talking to his family about events at work. He became more isolated and withdrawn, keeping to himself, feeling angry and sad. Frequently, complainant lost patience with family members, including his favorite nephew, becoming short-tempered and irritable. Complainant's father observed, "He was not the same person as before."

c. Complainant's social behavior with others also changed. Previously, he enjoyed dancing and socializing with people on weekends. As a result of the events at work, complainant lost the desire to go out or be active. He "didn't care anymore about [his] life."

d. Complainant's appetite diminished and he stopped cooking meals. Complainant had sleeping problems, having nightmares about dangerous things happening to him.

e. While working for respondent, complainant became frustrated, feeling that he was not a human being and that he was "just in the way for the entire company because of that fact that [he is]...a homosexual." The events at work were devastating for complainant. He stated, "It's taking me to the grave."

f. After complainant stopped working for respondent, complainant thought and had bad dreams about conduct that had occurred there. This made him feel bad and very angry. At the date of hearing, he still had those feelings.

## DETERMINATION OF ISSUES

### Liability

The Department asserts that complainant was harassed, on the basis of his sex and sexual orientation, in violation of Government Code section 12940, subdivisions (a) and (j)(1). The Department also alleges that respondent failed to take all reasonable steps to



prevent harassment and discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

#### A. Sex and Sexual Orientation Harassment

Government Code section 12940, subdivision (a), provides that, “[i]t shall be an unlawful employment practice . . . [f]or an employer . . . because of the . . . sex, or sexual orientation of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” (Gov. Code, §12940, subd. (a).) In addition, section 12940, subdivision (j)(1), provides that it is unlawful to harass an employee on the basis of sex or sexual orientation.<sup>1</sup> Harassment of a male by another male is unlawful under these subdivisions. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1418; *Dept. Fair Empl. & Hous. v. Greg Jarvis* (2001) No. 01-02-P, FEHC Precedential Decs. 2000-2002, CEB 1, p. 7; see also *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79-81.)

The Department may establish a violation under subdivisions (a) and (j)(1) by proving that there was unwelcome harassing conduct based on complainant’s sex or sexual orientation, that the unwelcome conduct created a hostile work environment—regardless of whether the complainant suffered tangible or economic loss such as a promotion, pay increase, or the job itself—and that respondent can be held liable for the conduct. (Gov. Code, §12940, subds. (a) and (j)(1); Cal. Code Regs., tit. 2, §7287.6, subd. (b); *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-617; *Mogilefsky v. Superior Court*, *supra*, 20 Cal.App.4th at pp. 1413-1414; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 605-608.)

#### 1. Whether Unwelcome Conduct on the Bases of Sex and Sexual Orientation Occurred

##### a. Credibility of Complainant and Other Witnesses

The Department asserts that respondent’s employees engaged in unwelcome conduct toward complainant based upon his sex and sexual orientation. The testimony of complainant, coworker Terry Sump and complainant’s family members establishes that such unwelcome conduct occurred.

Complainant’s demeanor, manner, and attitude on the witness stand was that of a truthful person. Complainant credibly testified that throughout his employment, respondent’s employees engaged in recurring instances of verbal abuse and offensive physical conduct, as described in the findings of fact. Complainant credibly testified that

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<sup>1</sup> In 1999, the Legislature amended FEHA explicitly to prohibit discrimination and harassment on the basis of sexual orientation. (Gov. Code, §12940, subds. (a) and (j)(1).) This replaced former Labor Code section 1102.1, which prohibited sexual orientation discrimination. (See *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1353-57.)

coworkers frequently called him names, mimicked anal sex, twisted nipples, grabbed each others' buttocks, and asked him questions about his sexual practices, such as whether he liked "dick." Complainant credibly testified that on three occasions Arcadio Godinez exposed his penis to complainant. Moreover, complainant credibly testified that the verbal remarks and conduct were unwelcome, that he repeatedly told the perpetrators to stop, and that the conduct upset and offended him. Complainant also credibly testified that he repeatedly complained to supervisor Frank Neves about the conduct, and eventually, in June 2000, to plant manager Lenny Bass.

Complainant's testimony was corroborated by coworker Terry Sump, who had daily contact with complainant from October 1999 through July 2000. Sump credibly testified that he witnessed or participated in some of the conduct described by complainant. Sump testified that he heard the name-calling, and heard the Arcadio Godinez ask complainant if he liked "dick." Sump corroborated that in complainant's presence, coworkers twisted each other's nipples, grabbed each other's buttocks, and grabbed their own genitals. Sump also corroborated that complainant did not welcome the verbal and physical conduct directed at him. Sump testified that complainant looked offended when coworkers grabbed their crotches, and afterward complainant told Sump that the conduct left him frustrated and angry.

Respondent argues that Terry Sump's testimony should be discredited because Sump was a disgruntled ex-employee. The evidence showed that respondent terminated Sump's employment. Respondent did not establish, however, that Sump's testimony was motivated by animus towards his ex-employer. On the contrary, Sump's testimony was not a one-sided version of events in support of complainant. In fact, Sump suggested that complainant might not have been subjected to the offensive remarks and conduct if complainant had not been "openly homosexual." Moreover, Sump credibly testified about his own participation in much of the offensive conduct at issue. Therefore, respondent's attempt to discredit Sump's credibility is unpersuasive.

Complainant's father, Marco Velez, and sister, Lenore Gaufo, also corroborated complainant's testimony. Both were credible in their recounting complainant's description of events at work. Marco Velez testified that complainant told him about Jose Nunes grabbing his crotch. Lenore Gaufo testified that things had worsened for complainant throughout his employment. Both witnesses testified that during complainant's employment, he told them about coworkers calling him names. Furthermore, both witnesses, in their description of complainant's accounts of his work-related difficulties, also confirmed that the conduct by complainant's coworkers was unwelcome to complainant.

Respondent's witnesses, for the most part, denied that the conduct at issue took place. Some witnesses—such as Arcadio Godinez and Jose Nunes—testified upon cross-examination that they did not know or even suspect that complainant was homosexual. The evidence is to the contrary. For example, Terry Sump credibly testified that on his first day of work, Arcadio Godinez and Jeremiah Beshears told him that complainant was homosexual. Moreover, the record shows that Arcadio Godinez and Jose Nunes were

extensively involved in offensive conduct toward complainant. As a result, and in light of the manner and character of their testimony, as well as their demeanor, Arcadio Godinez and Jose Nunes were not credible witnesses. (See Evid. Code, §780, subs. (a) & (b).) A number of other witnesses who categorically denied the events took place were shown to have engaged in the offensive conduct at issue and similarly lacked credibility.

Respondent argues that Fernando Torres is a “credible and neutral” witness, not accused of any harassing conduct. Respondent asserts that Torres’ testimony that he did not hear any name-calling or see the offensive conduct established that no such conduct occurred. The failure to observe harassing conduct at any time, however, does not prove that the conduct did not occur. Moreover, Torres did not begin working for respondent until January 2000. As a result, his testimony does not disprove complainant’s account of the events that occurred in 1998 and 1999, when Torres was not employed by respondent. Significantly, in contrast to Torres’ testimony, even respondent’s own investigation concluded that its employees had engaged in name-calling.<sup>2</sup>

Thus, the Department has established that complainant was credible in his testimony and that respondent’s employees subjected complainant to unwelcome verbal and physical conduct during his employment as described in the findings of fact.

b. Conduct on the Bases of Sex and Sexual Orientation

The Act’s prohibition of sexual harassment reaches conduct that is sexual in nature, such as sexual touchings, propositions or physical gestures and verbal remarks about sexual acts. It also reaches hostile conduct—whether or not explicitly sexual—based upon an individual’s gender. (*Mogilefsky v. Superior Court*, *supra*, 20 Cal.App.4th at pp. 1414-1415; *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 344, 348; Cal. Code Regs., tit. 2, §7287.6, subd. (b).) The term “sex” includes “gender.” (Cal. Code Regs., tit. 2, §7290.7.)

Respondent’s employees subjected complainant to explicitly sexual conduct—such as penis exposure, crotch and buttocks grabbing, mimicking anal sex, sexual propositions, and talk about sexual practices. Other conduct—such as name-calling (“faggot,” “joto,” “woman,” “mariposita,” “mamasita,” “lesbian,” “woman,” “Ana,” “Rosalinda,” “Thalia,”) and employees’ mocking complainant by fluttering their fingers, puckering their lips, and walking in a feminine manner—evinced a hostility toward complainant because he did not conform to their stereotypic view about how a man should act. The use of sex stereotypes can, as here, constitute sex discrimination and harassment. (Cal. Code Regs., tit. 2, §§7290.7, subd. (b), and 7291.0, subd. (e); *cf. Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250-251; *Nichols v. Azteca Restaurant Enterprise, Inc.*, *supra*, 256 F.3d at p. 874.)

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<sup>2</sup> Respondent also argues that the alleged conduct was not unwanted, averring that complainant engaged in some name-calling and had good interactions with his coworkers on and off the job. This decision credits complainant’s testimony that it was his coworkers, and not he, who engaged in name-calling. Furthermore, “the fact that not all of . . . [complainant’s] interactions with his harassers were hostile does not mean that none of them was....” (*Nichols v. Azteca Restaurant Enterprise, Inc.* (9th Cir. 2001) 256 F.3d 864, 873.)

Much of respondent's employees' conduct—such as calling complainant “faggot,” “joto,” “mariposita,” and “lesbian”—and asking him if he liked “dick,” is also reached by the Act's ban on harassment on the basis of sexual orientation. (Gov. Code, §12040, subds. (a) and (j)(1).) “Sexual orientation” includes homosexuality. (Gov. Code, §12926, subd. (q).)

Thus, the evidence established that respondent's employees subjected complainant to unwelcome conduct on the basis of complainant's sex and sexual orientation, as described by the findings of fact.

## 2. Hostile Work Environment

In cases alleging hostile work environment harassment, the Department must establish that the unwelcome conduct is sufficiently severe or pervasive to alter the conditions of the complainant's employment and to create an intimidating, oppressive, hostile, abusive or offensive work environment, or otherwise interfere with his emotional well-being or ability to perform his work. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1000; *Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at pp. 516-520; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608; *Dept. Fair Empl. & Hous. v. Greg Jarvis*, *supra*, 2000-2002, CEB 1, at p. 10.) The objective severity of the harassment is judged from the perspective of a reasonable person in the complainant's position, considering all of the circumstances, and is guided by common sense and sensitivity to social context. (*Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at p. 517, citing *Oncale v. Sundowner Offshore Services, Inc.*, *supra*, 523 U.S. at p. 81; *Dept. Fair Empl. & Hous. v. Greg Jarvis*, *supra*, 2000-2002, CEB 1, at p. 10.)

The evidence established that the unwelcome conduct directed at complainant in respondent's workplace was pervasive, occurring regularly and repeatedly throughout complainant's employment with respondent. Some of the conduct also was severe, such as when Arcadio Godinez exposed his penis and asked for oral sex. The pervasiveness of the unwelcome conduct and the severity of its offensiveness rendered complainant's work environment both subjectively and objectively hostile, abusive, and offensive. The conduct altered the conditions of complainant's employment by creating a work environment so objectively offensive that a reasonable person in his circumstances would find it hostile, abusive, and offensive.<sup>3</sup>

## 3. Employer Liability for Coworker Sex and Sexual Orientation Harassment

The Department asserts that respondent is liable for the harassment of complainant by his coworkers. The Act provides that an employer is liable for sex and sexual orientation harassment of its non-supervisory employees if the employer, or its agent or supervisor

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<sup>3</sup> Although the issue was not raised or briefed by respondent, the record shows that the harassment complainant suffered throughout his employment constituted a continuing violation. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798; *Birschtein v. New United Motor Manufacturing, Inc.*, *supra*, 92 Cal.App.4th 994.)

“knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” (Gov. Code, §12940, subd. (j)(1); *Dept. of Fair Empl. & Hous. v. Madera County* (1990) No. 90-03, FEHC Precedential Decs. 1990-1991, CEB 1, at p. 24.)

a. Supervisor under the Act

The Act defines “supervisor” as “any individual having the authority . . . to assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action. . . .” (Gov. Code, §12926, subd. (r).) The record showed that Production Supervisor Frank Neves had the authority to direct the work of his employees. He assigned the work to them and was responsible for determining when they should come into work, take breaks and finish for the day. In addition, Neves was responsible for employee discipline. He had the authority to issue oral and written reprimands. Neves also made recommendations for promotions. Thus, Frank Neves was a “supervisor” within the meaning of the Act.

b. Knowledge of the Conduct

The record also established that supervisor Neves had knowledge of complainant’s harassment and consequent distress. Throughout complainant’s employment, complainant repeatedly told Neves about coworkers’ unwelcome remarks and physical conduct directed towards complainant at the plant. Moreover, the record shows that Neves had “knowledge” of some of the offensive conduct because he engaged in it—on one occasion attempting to touch complainant’s buttocks and another time called complainant “my love.” Thus, the evidence established that respondent, through supervisor Frank Neves, had sufficient knowledge of complainant’s harassment to trigger respondent’s duty to conduct a prompt investigation and take appropriate corrective action.<sup>4</sup>

c. Immediate and Appropriate Corrective Action

An employer has an obligation to take “prompt, effective action” to eliminate harassment. (Gov. Code, §12940, subd. (j)(1); *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528.) “Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment by the same offender or others.” (*Fuller v. City of Oakland, supra*, 47 F.3d at p. 1528; *Dept. Fair Empl. & Hous. v. Del Mar Avionics* (1985) No. 85-19, FEHC Precedential Decs. 1984-85, CEB 16, p. 32.)

The record reflects that respondent did not take immediate and appropriate corrective action to eliminate the harassment. Here, the investigation was “too little, too late”—respondent’s action was neither prompt nor effective. Throughout complainant’s

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<sup>4</sup> Complainant credibly testified that he repeatedly complained to Frank Neves about the offensive conduct. At hearing, Neves denied that some of these complaints were made, but acknowledged that complainant had complained to him on at least three occasions. To the extent that Neves’ version conflicts with complainant’s testimony, this decision does not credit Neves’ testimony.

employment, complainant told Frank Neves about the offensive conduct, but Neves did not take appropriate corrective action to remedy the harassment. When Neves received complaints from complainant, Neves laughed them off or said he would “take care” of the situation. Nonetheless, the conduct continued. The record also shows that respondent did not begin an investigation until August 7, 2000. Thus, almost two years elapsed from when complainant first talked to Neves about his coworkers’ conduct and respondent’s investigation of complainant’s complaints. Under these circumstances, this decision finds that respondent failed to take adequate remedial action.<sup>5</sup>

In sum, the record establishes that based upon the knowledge of respondent’s supervisor and respondent’s failure to take “immediate and appropriate corrective action” regarding the harassment of complainant by his coworkers, respondent is liable for the harassment, in violation of Government Code section 12940, subdivisions (a) and (j)(1).

**B. Failure to Take All Reasonable Steps Necessary to Prevent Harassment and Discrimination from Occurring**

The Department also charges that respondent violated Government Code section 12940, subdivision (k), by failing in its affirmative duty to take all reasonable steps necessary to prevent unlawful harassment and discrimination from occurring. Respondent was obligated to “establish affirmative programs which include prompt and remedial internal procedures for handling sexual harassment complaints.” (*Dept. Fair Empl. & Hous. v. Madera County*, *supra*, 1990-1991, CEB 1, at pp. 28-29.)

The record shows that respondent posted the Department’s anti-discrimination poster and had a sexual harassment policy. Nonetheless, “the force with which an employer responds to specific incidents of harassment is as important a part of its efforts to deter harassment as are implementation of a policy against harassment and other affirmative steps taken in advance of any actual incidents.” (*Dept. Fair Empl. & Hous. v. Madera County*, *supra*, 1990-1991, CEB 1, at p. 28, (*citations omitted*)). Through supervisor Frank Neves, respondent had knowledge of the harassment, but neither Neves nor respondent took any action to prevent it for close to two years. Thus, respondent did not take appropriate steps to eliminate or prevent the harassment of complainant.

Accordingly, respondent failed to take reasonable steps to prevent unlawful harassment from occurring, in violation of Government Code section 12940, subdivision (k).

**Remedy**

Having established that respondent is liable for the unlawful harassment of complainant and failure to take reasonable steps to prevent the harassment, the Department is

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<sup>5</sup> The efficacy of the investigation itself is questionable. Respondent never spoke to Terry Sump, a key witness who sought to be interviewed, or Luis Lopez, a supervisor who engaged in some of the harassment.

entitled to an order of whatever forms of relief are necessary to make complainant whole for any loss or injury he suffered as a result of such harassment. The Department must demonstrate the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code Regs., tit. 2, §7286.9; *Dept. Fair Empl. & Hous. v. Madera County*, *supra*, 1990-1991, CEB 1, at pp. 33-34.)

The Department's accusation requested an award of damages for emotional distress, an administrative fine, and affirmative relief. The Department does not seek back pay or reinstatement for complainant.

#### A. Damages for Emotional Distress

Government Code section 12970, subdivision (a)(3), authorizes the Commission to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (1988) No. 88-05, FEHC Precedential Decs. 1988-1989, CEB 4, pp. 10-14.)

In this case, complainant's well-being changed dramatically as a result of the harassment by his coworkers. Prior to working for respondent, complainant was a happy and gregarious person. He enjoyed spending time with his immediate and extended family, as well as socializing with friends. As a result of the harassment at work, however, complainant was, as his father put it, "not the same person as before." He became isolated and withdrawn, feeling angry and depressed. He had trouble sleeping, having nightmares about dangerous things happening to him, and he stopped cooking altogether as his appetite diminished. Complainant's relationship with his family crumbled, as he became short tempered and irritable with them, including his favorite nephew. Complainant simply did not "care anymore about [his] . . . life."

Complainant's dignity was clearly damaged by the onslaught of offensive conduct at work and his ability to associate with coworkers plainly was compromised. The harassment, which was egregious, occurred for close to two years, with complainant still feeling the emotional effects at the time of hearing.

The Department seeks, and this decision awards \$80,000 as compensation for complainant's emotional distress. Interest will accrue on this amount, at the rate of ten

percent per year from the effective date of this decision until the date of payment. (Code Civ. Proc., §685.010.)

#### B. Administrative Fine

The Department also requests an order awarding an administrative fine of \$10,000 to vindicate the purpose and policy of the Act. The Commission is authorized to order administrative fines where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, expressed or implied, as required by Civil Code section 3294. (Gov. Code, §12970, subd. (d).)

Malice is defined in [section 3294](#) as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” (Civ. Code, §3294, subd. (c)(1).) Oppression is defined as “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” (Civ. Code, §3294, subd. (c)(2).)

The record does not establish through clear and convincing evidence that respondent was guilty of oppression, fraud, or malice. The record does not show that those in upper management at the plant—Plant Manager Lenny Bass, Assistant Plant Manager Jean-Paul Martin, and Production Manager Bertrand Rouille—acted with either the requisite intent to cause complainant injury, or engaged in despicable conduct in willful/conscious disregard of complainant’s rights, as required by Civil Code section 3294 and Government Code section 12970, subdivision (d). Therefore, no administrative fine will be ordered in this case. (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563 [punitive damages against employer barred under Civil Code 3294 standard unless wrongdoing managing agent is a policy-maker].)

#### C. Affirmative Relief

The Department requests that respondent be ordered to develop and implement an effective written policy against harassment which conforms with the provisions of the Act, to train its employees and managers with respect to this policy, and to post a notice acknowledging respondent’s unlawful conduct toward complainant. These additional forms of relief are appropriate.

##### 1. Anti-Harassment Policy

Respondent will be ordered to develop and implement a policy that prohibits sex and sexual orientation harassment in compliance with the requirements of Government Code section 12940, subdivisions (a) and (j)(1).



This policy must be given to all of respondent's employees, managers and supervisors. It must be written in English, Spanish, and Portuguese. It must, at a minimum, contain the following elements:

- a. A clear and comprehensive description of the kinds of conduct that constitutes sex and sexual orientation harassment, and a forceful statement that such conduct is prohibited by respondent's rules, and by state law;
- b. A clear statement of any employee's right to complain about sex and sexual orientation harassment without fear of retaliation, and a procedure for making such complaints;
- c. A procedure for promptly, fully, and objectively investigating complaints of sex and sexual orientation harassment to determine their merits; and,
- d. A statement that forceful and appropriate measures will be taken to punish offenders and redress the harm done to their victims.

## 2. Posting Policy and Notice

To inform its employees that unlawful sex and sexual orientation harassment is forbidden and that relief from these forms of unlawful conduct is available, respondent will be ordered to post, in English, Spanish, and Portuguese, conspicuous copies of its written anti-harassment and discrimination policy. Respondent will also be ordered to post a notice acknowledging its unlawful conduct (Attachment A) with a notice of employees' rights and obligations with regard to unlawful harassment under the Act (Attachment B).

## 3. Training Program

Respondent will further be ordered to implement a training program to inform its employees, supervisors, and managers fully of the nature of prohibited harassment, the duty of all employers, supervisors, and managers to prevent and eliminate harassment in the workplace, and the procedures and remedies available under respondent's anti-harassment policy and state law. Respondent shall secure advance approval from the Department of the form and content of this training program, and the Department will monitor its implementation. (*Dept. Fair Empl. & Hous. v. Madera County, supra*, 1990-1991, CEB 1, at p. 40; *Dept. Fair Empl. & Hous. v. Del Mar Avionics, supra*, 1984-1985, CEB 16, at p. 34.)

## ORDER

1. Respondent Lactalis USA, Inc. shall immediately cease and desist from harassment on the bases of sex and sexual orientation.

2. Within 60 days of the effective date of this decision, respondent Lactalis USA, Inc. shall pay to complainant Julio Mario Velez actual damages for emotional distress in the amount of \$80,000 together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.

3. Within 10 days of the effective date of this decision, a representative of respondent Lactalis USA, Inc. shall sign notices which conform to Attachments A and B of this decision and shall post clear and legible copies of these notices in English, Spanish, and Portuguese, in a conspicuous place where employees view employee notices. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material. The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachments B shall be posted permanently.

4. Within 60 days of the effective date of this decision, respondent Lactalis USA, Inc. shall create and implement a written policy on unlawful harassment conforming to the description on pages 15 and 16 of this decision. Respondent Lactalis USA, Inc. shall give a copy of this policy in English, Spanish, and Portuguese to each employee and shall permanently post clear and legible copies of the policy in English, Spanish, and Portuguese next to all posted copies of the notice conforming to Attachments B. Posted copies of this policy shall not be reduced in size, defaced, altered, or covered by other material.

5. Within 60 days of the effective date of this decision, respondent Lactalis USA, Inc. shall create and implement a training program to inform its employees, supervisors, and managers of the nature of prohibited harassment, the duty of all employers, supervisors, and managers to prevent and eliminate harassment, and the procedures and remedies available under respondent Lactalis USA, Inc.'s own policy and state law. Respondent Lactalis USA, Inc. shall secure advance approval from the Department of Fair Employment and Housing of the form and content of the training, which shall be conducted by someone other than respondent Lactalis USA, Inc. The Department shall monitor the implementation of this training program.

6. Within 100 days after the effective date of this decision, respondent Lactalis USA, Inc. shall in writing notify the Department and the Commission of the nature of its compliance with this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, Title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

Dated: September 11, 2002

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JO ANNE FRANKFURT  
Hearing Officer

ATTACHMENT A

NOTICE  
to  
ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH  
LACTALIS USA, INC.

After a full hearing, the California Fair Employment and Housing Commission has found that Lactalis USA, Inc. has violated the Fair Employment and Housing Act. (*Dept. Fair Empl. & Hous. v. Lactalis USA, Inc.* (2002) No. 02-\_\_.)

As a result of this decision, Lactalis USA, Inc. has been ordered to post this notice, and to take the following actions:

1. Cease and desist from sex and sexual orientation harassment.
2. Pay a monetary award to the complainant for emotional distress.
3. Post a statement of employees' rights and remedies under the Fair Employment and Housing Act.
4. Create and implement a formal written policy and training program on sex and sexual orientation harassment.

DATED:

BY: \_\_\_\_\_  
[Name][Title]  
Lactalis USA, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE  
to  
ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH  
LACTALIS USA, INC.

**YOUR RIGHTS AND REMEDIES UNDER THE  
CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT**

**YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL EMPLOYMENT  
HARASSMENT**

The California Fair Employment and Housing Act prohibits harassment because of race, religious creed, color, national origin, ancestry, physical and mental disability, medical condition, marital status, sex, sexual orientation, and age. You have the right to be free of all such harassment in your workplace. Such harassment may take various forms, including:

- **VERBAL CONDUCT** such as epithets, derogatory comments, slurs, unwanted sexual advances, invitations, comments, or name-calling
- **VISUAL CONDUCT** such as derogatory posters, cartoons, drawings, gestures, or mimicking sexual acts
- **PHYSICAL CONDUCT** such as assault, blocking normal movement, touching body parts or interference with work directed at you because of your sex, sexual orientation, or other protected basis
- **THREATS AND DEMANDS** to submit to sexual requests in order to keep your job or avoid some other loss, and offers of job benefits in return for sexual favors
- **RETALIATION** for having resisted or reported the harassment

The law prohibits any form of protected-basis harassment that impairs your working ability or emotional well-being at work. You may have a claim of harassment even if you have not lost your job or some other benefit.

**YOU HAVE THE RIGHT TO COMPLAIN ABOUT SUCH HARASSMENT AND GET RELIEF.**

Lactalis USA, Inc. has a policy against harassment which is posted next to this Notice. If you think you are being harassed on the job because of your sex, sexual orientation, race, ancestry or other protected basis, you should use the procedures outlined in this policy to file a complaint and have it investigated.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such harassment in employment. If you think you are being harassed or that you have been retaliated against for resisting or complaining about harassment, you may file a complaint with the Department at:

Department of Fair Employment and Housing  
1320 E. Shaw Avenue, Suite 150  
Fresno, CA 93710  
(559) 244-4819  
or (800) 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the harassment stopped and can require your employer to reinstate you and to pay back wages and other out-of-pocket losses, damages for emotional injury, administrative fines or punitive damages, and other appropriate relief.

DATED:

BY: \_\_\_\_\_  
[Name][Title]  
Lactalis USA, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.